NO. 50337-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ADONIS LYNNARD BROWN,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT DEPARTMENT OF LABOR AND INDUSTRIES

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I. INTRODUCTION

Adonis Brown pleaded guilty to manslaughter after he shot and killed 13-year-old A.N.D. The Department of Labor and Industries paid A.N.D.'s burial expenses under the Crime Victims' Compensation Act, RCW 7.68. After paying the expenses—and within a year of Brown's sentencing—the Department petitioned the superior court for restitution. At hearing, Brown argued that the Department should petition under a different cause number and that he had no ability to pay the burial expenses. The court rejected these arguments and granted the Department's restitution request.

Brown now asserts that his plea statement and his judgment and sentence led him to believe that the Department would not seek restitution. He did not raise this argument before the trial court. Nor do these documents purport to limit the Department from recovering restitution as Brown suggests. Because the superior court did not abuse its discretion in entering restitution, this Court should affirm the order requiring Brown to compensate the victims of his crimes.

II. ISSUES

1. A court generally does not consider new issues on appeal. At hearing, Brown did not assert that his plea statement or the judgment and sentence precluded restitution under the Crime

Victims' Compensation Act. Should the Court consider Brown's new argument?

2. Neither Brown's plea statement nor the judgment and sentence identified who could seek restitution from Brown, stating merely that a later court order would set restitution. Does either document prohibit the Department from petitioning for a restitution order?

III. STATEMENT OF FACTS

The Pierce County prosecutor charged Brown with manslaughter after he fatally shot 13-year-old A.N.D. in the woods near Joint Base Lewis-McChord.[1] CP 43-44, 54. After the shooting, A.N.D. was in the hospital for about a week before passing away. CP 6, 26. When he died, his family was left with $322,909.34 in outstanding medical bills. CP 12, 24-42.

Brown pleaded guilty to the charges. CP 45-55. As part of his plea, Brown acknowledged that the superior court would order restitution:

> If this crime resulted in injury to any person or damage to or loss of property, the judge will order me to make restitution, unless extraordinary circumstances exist which make restitution inappropriate. The amount of restitution may be up to double my gain or double the victim's loss. The judge may also order that I pay a fine, court costs, attorney fees, and the costs of incarceration.

CP 47.

[1] The prosecutor also charged Brown with a firearm enhancement and unlawful possession of a firearm in the first degree. CP 43-44.

The prosecutor agreed to recommend a standard range sentence with credit for time served, agreeing that Brown could argue for the low end of the range. CP 49. The prosecutor further agreed to recommend a "$250.00 filing fee, $100.00 DNA fee, $500.00 CVPA, [and] $400.00 DAC recoupment."[2] The parties did not agree to a restitution amount. The prosecutor agreed to recommend that the court set "[r]estitution if any by later order [of] the court."[3] CP 49.

Brown's attorney read and discussed the plea statement with him. CP 54. Brown agreed that his counsel had explained the statement and that he understood the terms. CP 54.

The superior court held a sentencing hearing in February 2016. CP 74. The prosecutor and Brown's attorney each made recommendations, and both A.N.D.'s family and Brown addressed the court. CP 74. The court sentenced Brown to 94 months of total confinement, within the standard range for his crimes. CP 61-69.

As part of the judgment and sentence, the court ordered that Brown pay $800 to the court clerk. CP 63-64. It specified, "[t]he above total does

[2]CVPA stands for Crime Victim Penalty Assessment. DAC stands for Department of Assigned Counsel.

[3] In the plea statement, this section reads "Restitution if any by later order *or* the court." CP 49 (emphasis added). Brown appears to agree that this is a scrivener's error and that both Brown and the prosecutor believed that the word "or" was intended to be written as "of." Appellant's Brief (AB) 10.

not include all restitution which may be set by later order of the court." CP 64. The court noted that an agreed restitution order could also be entered. CP 64.

Brown waived his right to be present at any restitution hearing. CP 68, 74. The superior court had not yet scheduled a hearing at the time of sentencing. CP 64. Accordingly, the court checked a box indicating that "a restitution hearing . . . shall be set by the prosecutor." CP 64.

After Brown's sentencing, A.N.D.'s family applied for benefits through the crime victims' compensation program. CP 93. The Department of Labor and Industries administers this program. *See* CP 92-94. In September 2016, the Department helped the family to pay burial expenses for A.N.D. CP 3, 95. The total payment was $5,750. CP 3, 94.

In January 2017, a victim advocate with the prosecutor's office requested a restitution order from the court. CP 12. The prosecutor sought reimbursement for both the $322,909.34 in medical expenses and the $5,750 in burial costs paid by the Department. CP 12. The court set a restitution hearing for later that month. CP 76.

Under the restitution statute, a court must generally determine the amount of restitution within 180 days of sentencing. RCW 9.94A.753(1). But where the Department compensates a victim under the crime victims' compensation program, the Department may petition the court within one

year for entry of a restitution order. RCW 9.94A.753(7). At the hearing, A.N.D.'s family argued that although more than 180 days had passed since Brown's sentencing, the court should nevertheless order restitution for the medical expenses. CP 77-83. Regarding the burial expenses, the prosecutor attempted to assert the request for restitution on behalf of the Department. *See* CP 86.

The superior court denied the restitution request. CP 86. It found no good cause to justify entering a restitution order for the medical expenses more than 180 days after Brown's sentencing. CP 86. As for the claimed burial expenses, although the statute allowed the Department a full year to petition, the court noted that the prosecutor had not demonstrated authority to act on behalf of the Department. CP 86.

The Department then petitioned the court for a restitution order. CP 89-97. It sought only the burial expenses paid under the crime victims' compensation program. CP 89. At hearing, Brown's attorney lodged two objections. RP 6. First, he argued that the Department could not petition the court under the cause number for Brown's criminal case. RP 6-7. Second, he asserted that the court should not grant restitution because Brown had no ability to pay the $5,750. RP 10. He argued that the

Supreme Court's decision in *State v. Blazina* precludes restitution where a defendant has no ability to pay.[4] RP 10.

The superior court rejected both arguments. It saw no basis for a separate cause number, noting "nothing in the statute requires a separate cause number." RP 9. And it explained that *Blazina* does not apply to restitution orders. RP 10-11. The court granted the Department's restitution request. CP 99-100. Brown appeals.

IV. STANDARD OF REVIEW

"A trial court's order of restitution will not be disturbed on appeal absent abuse of discretion." *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). A court reviews issues about interpreting a plea agreement de novo. *State v. Bisson*, 156 Wn.2d 507, 517, 130 P.3d 820 (2006).

V. ARGUMENT

Brown failed to preserve his arguments for appellate review. At no point did he argue that either his plea or the judgment and sentence misled him about the Department's statutory right to seek restitution for A.N.D.'s burial expenses. The Court should not consider this argument.

If the Court addresses Brown's new argument, it should reject it. Neither the plea statement nor the judgment and sentence purport to

[4] *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015)

preclude the Department from seeking restitution. And because a plea agreement binds only a defendant and the prosecutor, the agreement cannot bind the Department. The Department does not act as an arm of the prosecution but as the real party in interest when seeking restitution under the Crime Victims' Compensation Act. This Court should affirm the superior court's restitution order.

A. Brown Did Not Preserve His Argument Where He Failed To Raise Any Issue about His Plea Agreement or the Judgment and Sentence at the Restitution Hearing

A party cannot raise new issues for the first time on appeal unless the issue implicates the trial court's jurisdiction or constitutes a manifest error affecting a constitutional right. RAP 2.5(a). A court may also consider whether a trial court has exceeded its statutory authority in entering an untimely restitution order. *State v. Moen*, 129 Wn.2d 535, 546-48, 919 P.2d 69 (1996). Where an appellant challenges the amount of restitution, a court will not consider such argument for the first time on appeal. *State v. Hassan*, 184 Wn. App. 140, 151, 336 P.3d 99 (2014).

Here, Brown argues that his plea statement and the judgment and sentence misled him about the type of restitution the superior court could order. But he did not raise this issue at the restitution hearing. As he concedes, his counsel argued only that Brown had no ability to pay and that the Department could not seek restitution under his criminal cause

number. Appellant's Brief (AB) 5. He abandons both these arguments on appeal.

Brown does not try to demonstrate how his new argument raises any issue of jurisdictional or constitutional import. Unlike instances where the court has considered arguments regarding a defendant's plea for the first time on appeal, Brown does not contend that his plea was involuntary or that the prosecutor breached the plea agreement. *See, e.g., State v. Van Buren*, 101 Wn. App. 206, 211, 2 P.3d 991 (2000); *State v. Branch*, 129 Wn.2d 635, 643, 919 P.2d 1228 (1996). Nor does he argue that his plea statement or the judgment and sentence divested the trial court of statutory authority to enter restitution. Unlike the circumstance in *Moen,* the superior court addressed the Department's restitution request within the statutory time limit. *Compare Moen,* 129 Wn.2d at 546-48 *with* CP 99. Because Brown gives no reason to depart from the well-established rule that an appellant cannot argue new issues on appeal, this Court should not consider his arguments regarding the plea statement or the judgment and sentence.

B. The Department Followed Statutory Procedures in Requesting Restitution

The Crime Victims' Compensation Act provides "benefits to innocent victims of criminal acts." RCW 7.68.030(1). A victim is one

"who suffers bodily injury or death as a proximate result of a criminal act of another person." RCW 7.68.020(15). "Each victim injured as a result of a criminal act . . . or the victim's family or beneficiary in case of death of the victim, [is] eligible for benefits" RCW 7.68.070(1).

"Any payment of benefits to or on behalf of a victim under [the Act] creates a debt due and owing to the department by any person found to have committed the criminal act." RCW 7.68.120(1). Where an individual is convicted of a crime and the court enters no restitution order regarding crime victim restitution, "the department shall, within one year of imposition of the sentence, petition the court for entry of a restitution order." RCW 7.68.120(1).

Under the Sentencing Reform Act, RCW 9.94A, after a court receives a petition from the Department, it must hold a restitution hearing and enter a restitution order. RCW 9.94A.753(7). The court "shall order restitution in all cases where the victim is entitled to benefits under the crime victims' compensation act." RCW 9.94A.753(7).

The Department followed these statutory procedures in seeking restitution. The court found Brown to have committed the criminal act that resulted in A.N.D.'s death. CP 61-69, 93. The Department paid benefits to his family, creating a debt due and owing to the Department. CP 93. And because the court in Brown's criminal proceeding entered no restitution

order, the Department had to petition for entry of such an order within a year of his sentencing. This is what the Department did when it requested restitution for the benefits paid to A.N.D.'s family.

C. Nothing In Brown's Plea Statement or His Judgment and Sentence Limited the Department's Authority To Seek Restitution

Neither the plea statement nor the judgment and sentence conflicts with the Department requesting reimbursement for A.N.D.'s burial expenses. Brown does not dispute that he acknowledged in his plea that the judge would require him to make restitution. CP 47. And contrary to his arguments, no part of his plea statement purports to preclude restitution to the Department. Brown contends that "any reasonable person" would understand his plea in this way but fails to articulate how it can actually be read to support that conclusion. AB 1. His trial counsel did not share this view, opting not to make such argument at the restitution hearing. Nevertheless, Brown now asserts that because some language in his plea mirrors language from RCW 9.94A.753 that does not involve the Crime Victims' Compensation Act, he was misled to believe that the Department would not seek restitution. AB 2, 6-8. He is wrong.

1. The plea statement did not purport to limit the Department's right to seek restitution

Brown makes two arguments about his plea statement. First, he argues it mentions only language from subsections (1) through (6) of the RCW 9.94A.753, contending that this led him to believe that subsection (7) would not apply to him. AB 6-8. Second, he asserts that the plea stipulated that it would be the prosecutor and not the Department who would move for restitution. AB 6-7. Both arguments fail.

First, the fact that Brown's plea included language from certain subsections of RCW 9.94A.753 does not mean that no other statutory provision could apply to him. He cites no authority for this proposition, and the Court should disregard this argument. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (court does not consider arguments unsupported by authority). Under Brown's reasoning, only statutory language specifically referenced in a plea would apply to a criminal defendant. Following that logic, to ensure that a defendant was properly subject to the laws of Washington, every plea would include a complete copy of all statutes, regulations, and judicial decisions in our state. This is not and cannot be the law.

Nothing about the language in Brown's guilty plea sought to limit the Department from obtaining restitution. And indeed, it could not. "The

only parties to a plea agreement are the prosecutor and the defendant either through counsel or pro se." *State v. Sanchez*, 146 Wn.2d 339, 355, 46 P.3d 774 (2002). This Court has rejected arguments that other government agencies, as a part of the state, must abide by plea agreements. *State v. Barber*, 152 Wn. App. 223, 229, 217 P.3d 346 (2009) (holding Department of Corrections not bound where "only the prosecutor is bound by the plea agreement"). When petitioning for restitution under the Crime Victims' Compensation Act, the Department does not act as an arm of the prosecution but as the "real party in interest."[5] *State v. Reed*, 103 Wn. App. 261, 266, 12 P.3d 151 (2000). The Department was not a party to Brown's plea. CP 54. It is unsurprising that Brown's plea statement does not mention the Department where that document cannot bind the Department.

Without citation to authority, Brown argues that the plea statement binds the Department because the Department requested restitution under the same cause number as his criminal case. *See* AB 11. But it makes no difference that the Department petitioned under Brown's criminal cause number. Rather, this is simply what the statute requires. Under RCW 7.68.120(1), the Department must petition the "court in the criminal

[5] The Department suffered "a genuine loss" as the result of payments made on behalf of the victim of Brown's crimes. *See State v. Jeffries*, 42 Wn. App. 142, 144-45, 709 P.2d 819 (1985).

proceeding" for entry of a restitution order. The Department followed this statutory procedure in seeking restitution from Brown.

Even if the statement bound the Department, the restitution request complied with its terms. Brown points to language indicating that the judge would order restitution "unless extraordinary circumstances exist which make restitution inappropriate" and that "the amount of restitution may be up to double my gain or double the victim's loss." AB 6-7 (quoting CP 47). But while Brown is correct that this language is found in subsections (3) and (5) of the restitution statute, nothing about this language bars the Department from seeking restitution under subsection (7). Brown does not contend, nor could he, that either statement runs contrary to the Department's restitution request. At hearing, he identified no extraordinary circumstances that would make restitution inappropriate. RP 3-12. And the burial expenses paid by the Department fell well short of A.N.D.'s family's total losses.[6] CP 12. Because the Department's restitution request complied with the terms of Brown's plea statement, for this reason as well, the Court should affirm the superior court's order.

[6] A.N.D.'s family members constitute victims under both the Crime Victims' Compensation Act and the Sentencing Reform Act. Under the latter statute, "victim" means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged. RCW 9.94A.030.

Second, nothing in the plea statement indicates that only the prosecutor and not the Department would seek restitution in his case. Contrary to Brown's assertion, his plea does not say that only the prosecutor would "move for restitution." AB 2, 7-8, 10 (citing CP 49). This phrase does not appear in Brown's plea statement. Rather, the part cited by Brown relates to the parties' agreement about what the prosecutor would recommend at sentencing. The prosecutor agreed to recommend: "[r]estitution if any by later order [of] the court." CP 49. This does not say that only the prosecutor would seek restitution; it merely notes that the prosecutor agreed to recommend that the court issue a "later order" setting restitution if the court determined that such restitution was warranted. This is precisely what happened when the court entered the restitution order in February 2017. CP 99-100.

The parties' actions after sentencing also do not evidence an intent to limit restitution to subsections (1) though (6). *See* AB 8. Although it is true that the prosecutor first sought restitution from Brown, at that hearing, the prosecutor attempted to act on behalf of the Department in seeking compensation for A.N.D.'s burial expenses. *See* CP 86. This is hardly evidence that no restitution would be sought under subsection (7). Instead, it reveals the prosecutor's understanding that restitution would include

payments made under the Crime Victims' Compensation Act.[7] Despite Brown's misleading characterization of his plea, there was no indication that only the prosecutor would "move for restitution." *See* AB 7-8.

The rules of interpretation cited by Brown do not assist him regarding his plea. First, there is no ambiguity in the plea statement. *See* AB 11. He agreed that the trial court would impose restitution, and that agreement binds him. CP 47. In entering his plea, Brown agreed that his attorney had explained the statement and that he understood its terms.[8] CP 54. Nothing in the plea indicates that the Department could not seek reimbursement for payments to Brown's victim.

Second, Brown misapplies the maxim "ejusdem generis." AB 12. This rule of construction requires that "general words accompanied by specific words are to be construed to embrace only similar objects." *Sw. Wash. Chapter, Nat. Elec. Contractors Ass'n v. Pierce Cty.*, 100 Wn. 2d 109, 116, 667 P.2d 1092 (1983). The maxim applies where a list links both general and specific terms in a sentence. *Cascade Floral Prods., Inc. v. Dep't of Labor & Indus.*, 142 Wn. App. 613, 619, 177 P.3d 124 (2008). In

[7] Brown's attorney maintained this same understanding as shown by his failure to make any argument regarding the plea statement at the restitution hearing.

[8] Brown's citation to *In re Gault* regarding the capacity of minors is inapposite. AB 11 (citing *In re Gault*, 387 U.S. 1, 39 n.65, 87 S. Ct. 1428, 1432, 18 L. Ed. 2d 527 (1967)). There, the Court considered a juvenile's right to an attorney, a concern not present here. *Gault*, 387 U.S. at 40. Unlike the minor in *Gault*, a lawyer here represented Brown throughout the criminal proceedings in his case.

the only case cited by Brown, where a lease agreement required a tenant to "pay all costs, charges, insurance premiums, taxes, utilities, expenses, and prorated share of [common area maintenance] expenses," the general terms "costs," "charges," and "expenses" were limited to the same nature as the specific terms "insurance premiums," "taxes," "utilities," and "common area maintenance expenses." *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 714, 334 P.3d 116 (2014). And because these specific terms all related to the tenant's use and occupancy of the premises, the court rejected the landlord's argument that the tenant must also pay the costs of collecting rent. *Id*.

By contrast, Brown's plea statement contains no such list of general and specific terms. Brown asserts that because "only specific sections of the restitution statute are called out in the Statement, only those sections can apply to Brown." AB 12. But the maxim ejusdem generis does not apply when a document merely alludes to certain statutory language. A statutory phrase is not transformed into a specific term because it appears in a particular section of a statute. The statutory phrases Brown references are not specific terms but provisions setting out the requirements for restitution. As noted above, he does not assert that the Department's restitution request ran contrary to these requirements and, in essence, he simply repeats his argument that only statutory language

specifically referenced in a plea may apply to a criminal defendant. No court has applied the maxim in the way Brown proposes. This rule of construction is simply inapplicable where there is no list of general and specific terms.

2. The judgment and sentence did not prevent the Department from seeking restitution

The judgment and sentence also did not limit the Department's ability to seek restitution. Brown points to the court's statement that "a restitution hearing . . . shall be set by the prosecutor" to argue that only the prosecutor could set the hearing. AB 9 (citing CP 64). He asserts that this informed him that restitution was limited to subsections (1) through (6) and that, accordingly, the Department would not seek reimbursement under subsection (7) of the statute. AB 9. But in focusing on this language, Brown ignores the rest of the court's order.

The full language of the order is telling:

> [x] The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:
>
> > [x] shall be set by the prosecutor.
> > [ ] is scheduled for _____.

CP 64.

Contrary to Brown's arguments, no part of this language prevents the Department from seeking restitution. First, the court's order does not say that the Department could not petition for restitution—rather, while it directs the prosecutor to set a hearing, it places no limitations on the Department's ability to act. Second, the order is not limited to ordering Brown to pay restitution under subsections (1) through (6), but instead orders restitution under RCW 9.94A.753 as a whole. *Contra* AB 9. Third, the order specifically references "all" restitution, which includes claims under the Crime Victims' Compensation Act. Finally, the order only says that "a" restitution hearing shall be set by the prosecutor, not that "all" restitution hearings are set by the prosecutor.[9] No aspect of this language limits the Department's ability to act, and the Court should reject Brown's strained reading of his judgment and sentence.

Nor does it matter that no agreed order was entered. While Brown makes much of the court's note that "[a]n agreed restitution order may be entered" (*see* AB 2, 9 (citing CP 64)), this statement does not indicate that an agreed order was the only possible order the court could issue. Rather,

[9] In any event, while the record does not reveal who set the hearing in February 2017, it was the prosecutor and not the Department who signed the court's scheduling order. CP 88. Thus, because it appears the prosecutor did "set" the restitution hearing in this case, Brown's argument also fails on its own terms.

it simply informed Brown that an agreed order was one option in his case. It does not preclude a party from seeking restitution in other ways.

Finally, this case bears little resemblance to *State v. Minor*, where a sentencing court misled a defendant by failing to check a box indicating that he could not possess firearms. 162 Wn.2d 796, 803-04, 174 P.3d 1162 (2008). The court's failure to check the box affirmatively represented to the defendant that "the firearm prohibition did not apply to him." *Id*. But here, unlike in *Minor*, there was no box regarding the Department's statutory right to seek restitution from Brown. As the judgment and sentence did not indicate that the Department would not seek restitution, Brown's reliance on *Minor* is misplaced.

The superior court's order did not preclude the Department from seeking restitution under the Crime Victim's Compensation Act. The court's direction to the prosecutor to schedule a restitution hearing did not affect the Department's ability to act. This Court should affirm the restitution order requiring Brown to compensate the victims of his crimes.

D. The Court Should Assess Costs Against Brown

The Court should assess costs against Brown. An appellate court may require an appellant in a criminal case to pay appellate costs. RCW 10.73.160(1). Brown's arguments regarding the language of his plea statement and the judgment and sentence are without merit. Restitution is

both punitive and compensatory. *State v. Kinneman*, 155 Wn.2d 272, 279-80, 119 P.3d 350 (2005). The Legislature intends the restitution statute to require the defendant "to face the consequences of his or her criminal conduct." *State v. Tobin*, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007). This Court should assess costs.

VI. CONCLUSION

This Court should not review Brown's new argument about his plea statement and the judgment and sentence. He did not raise it below and it is without merit. If the Court chooses to consider the argument, it should reject it. Contrary to Brown's contention, neither his plea statement nor the judgment and sentence indicated that the Department could not seek restitution for the compensation it paid to his victims. This Court should affirm the superior court's restitution order.

RESPECTFULLY SUBMITTED this 13th day of November, 2017.

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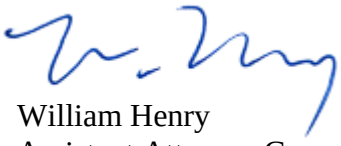

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ADONIS BROWN, Appellant, v. STATE OF WASHINGTON, Respondent.	DECLARATION OF MAILING

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DATED this 13th day of November, 2017.

KRISTEN HARRIS
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WASHINGTON ST. ATTORNEY GENERAL - LABOR & INDUSTRIES DIVISION - SEATTLE

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